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Supreme Court of the United States

October Term, 1956

MARVIN IRVING TAMARKIN,

Petitioner,

-vs-

SELECTIVE SERVICE SYSTEM, LOCAL DRAFT BOARD #47, MIAMI, FLORIDA, et al.,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the order of the United States District Court for the Southern District of Florida, which order denied Petitioner's motion for a preliminary injunction to enjoin the Petitioner's Selective Service Local Board from drafting him into the armed services.

OPINIONS BELOW

The Court of Appeals affirmed in the opinion set forth in Appendix A, infra (Pg. i) reported in 243 Fed. 2d 108 (advance sheet dated June 3, 1957). There is no opinion of the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered in this case on March 29, 1957. (See Appendix B, infra, page iii). The time for filing this petition for writ of certiorari expires on June 29, 1957. The jurisdiction of this Court is invoked under 28 USC section 1254 (1). The District Court had jurisdiction under Rule 65, Federal Rules of Civil Procedure.

QUESTIONS PRESENTED

I

Does a United States District Court have jurisdiction, upon proper petition timely brought, to grant injunctive relief to registrants when a direct judicial review of administrative orders of the Selective Service System reveals a denial of procedural due process of law?

II

Since the regulations require that when a registrant's classification was reopened and considered anew by his Local Draft Board, such classification shall be and have the effect of a new and original classification, did the Local Draft Board deny the petitioner procedural due process of law by holding that he was not entitled to a new physical examination and the 21 day waiting period thereafter before ordering him to report for induction because he had been given a physical examination and the 21 day waiting period in a previous classification which had no bearing or relation to his present classification?

SELECTIVE SERVICE REGULATIONS INVOLVED

Part 1625—Reopening and Considering Anew Registrant's Classification

"AUTHORITY: 1625.1 to 1625.14 issued under sec. 10, 62 Stat. 618, as amended; 50 USC App., 460.

"SOURCE: 1625.1 to 1625.14 contained in E.O. 9988, 13 F.R. 4874, Aug. 21, 1948, except as otherwise noted. Redesignated act 14 F.R. 5021, Aug. 13, 1949.

CLASSIFICATION ANEW

"1625.11 Classification considered anew when reopened. When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the name manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

"1625.12 Notice of action when classification considered anew. When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of 1623.4 of this chapter.

"1625.13 Right of appeal following reopening of

classification. Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

"1625.14 Order to report for induction to be canceled when classification reopened. When the local board has reopened the classification of a registrant, it shall cancel any order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner."

Section 1628.10—"Who will be examined."

AUTHORITY: sections 1628.1 to 1628.26 issued under sec. 10, 62 Stat. 618, as amended; 50 USC App 460

"Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

(E. O. 18292, 16 F. R. 9862, Sept. 28, 1951)

QUOTAS AND CALLS

AUTHORITY: Sec. 1631.1 to 1631.7 issued under Sec. 10, 62 Stat 618 as amended; 50 USC App 460.

Section 1631.7—"Action by local board upon receipt of call."

"Each local board, upon receiving Notice of Call on Local Board (SSS For No. 201) from the State Director of Selective Service for a specified number of men shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class 1-A and Class 1-A-O and have been found acceptable for service in the armed forces and to whom the local board has mailed a Certificate of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: . . . "

(Paragraph (a) amended by E.O. 10659, 21 F.R. 1103, Feb. 17, 1956)

NATIONAL HEADQUARTERS SELECTIVE SERVICE SYSTEM, Local Board Memorandum #28, paragraph 2 (a):

> "Except in the cases of postponed registrants, the 120 day period of validity continues in effect for armed forces physical examinations. However, when a registrant whose physical examination is more than 120 days old is selected for induction, the local board shall not order him to report for armed forces physical examination but shall order him to report for induction. In each such case the registrant will receive a complete examination at the armed forces examining and induction station and when found acceptable will be immediately inducted."

STATEMENT OF THE CASE

The Petitioner filed a civil suit in the United States District Court praying for a permanent injunction and moved for a preliminary injunction to enjoin his Local Draft Board from requiring him to comply with the mandate of an order to report for induction.

The District Judge heard oral argument of counsel and denied Petitioner's Motion. There was no written opinion. Petitioner duly appealed the Judge's Order to the Court below. The case was duly briefed, argued, and submitted, resulting in an affirmance of the District Judge's Order.

STATEMENT OF FACTS

Petitioner was born on July 26, 1930. He registered with his local draft board upon reaching his eighteenth birthday. After having been ordered to report for physical examination, he was mailed a Certificate of Acceptability on May 21, 1954. On October 20, 1955, his Local Draft Board unanimously agreed to reopen Petitioner's classification and considered it anew and again classified Petitioner in 1-A. Petitioner claimed exemption from service by reason of being a conscientious objector. The Local Draft Board denied the exemption and Petitioner's file was forwarded to the Appeal Board. An investigation of the Petitioner's background was made by the Federal Bureau of Investigation and a hearing was held by a Department of Justice hearing officer as to the merits of the Petitioner's claim; the hearing officer recommended that the Petitioner be granted exemption from service. The entire Selective Service file of the

Petitioner and the hearing officer's recommendation were reviewed by a Special Assistant to the Attorney General, whose opinion it was that the Petitioner was not entitled to exemption from service under current applicable statutes. The Petitioner exercised all of his appellate rights in defense of his position. On July 2, 1956 the Appeal Board classified Petitioner 1-A and he was notified as to the action on July 6, 1956. Accompanying the notification was an order to report for induction on July 23, 1956.

The Petitioner sought the intervention of the State Headquarters in order to have them order the Local Draft Board to give him a physical examination and a waiting period of 21 days before ordering him to report for induction. The State Headquarters refused to intervene. On July 17, 1956, the Petitioner filed an amended complaint and motion praying for injunctive relief. On July 19, 1956, a hearing was held and his motion was denied without opinion.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

2. The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

The issue involved in this case is one of interpretation of Selective Service regulations and the effect of their application on an individual registrant. There is no large body of case law which can assist the Court to arrive at

the ends of justice; judicial decisions on the issues involved are meager indeed. The Court will be required to make a judicial determination as to the propriety of an administrative act performed—no easy task. After the act complained of was done, suit was brought; The Honorable Judge of the District Court heard the facts and considered the argument of Counsel and committed, in the opinion of the Petitioner, reversible error. This is a case of first impression. Never before have facts similar to the instant case been placed before a judicial appellate tribunal for review; at least the Petitioner cannot find any such reported. The Court's opinion in this case will, therefore, probably have substantial and far-reaching results throughout the administration of the Selective Service System.

As to the first question presented to this Court, the Petitioner takes the position that what appellate opinion there is, taken cumulatively, can only lead reasonable men to the conclusion that direct judicial review and the application of injunctive relief against arbitrary procedures of Selective Service Boards is permissable—nay, essential, to prevent denials of procedural due process of law. The Court below, in its scanty opinion, cites *Witmer v. United States*, 348 U.S. 375, 99L. Ed 428, 75 S. Ct. 392, and *Watkins v. Rupert*, 2d Cir. 955, 224 F. 2d 47, as sufficient authority to hold that there is "no right to a direct judicial review of orders of the draft boards."

Analysis of the cases brought up for appellate review on the question of the propriety of injunctive relief prior to the exhaustion of administrative remedies and procedures reveals that the Courts have adopted two positions in this matter. The first position is one which says that

injunctive relief will not lie when a registrant seeks direct judicial review of the draft classification given him by his local board. *Witmer v. United States*, 348 U. S. 375, 99 L. Ed. 428, 75 S. Ct. 392; *Watkins v. Rupert*, 2d Cir. 1955, 224 F. 2d 47; *Schwartz v. Strauss*, 114 F. Supp. 439, Affirmed 206 F. 2d 767. The second position is one wherein the Courts have said that injunctive relief may be granted in order to correct procedural errors made by local draft boards which have resulted in a denial to the complaining registrant of procedural due process of law. *Townsend v. Zimmerman*, 237 F. 2d 376; *Tomlinson v. Hershey, et al*, 95 F. Supp. 73; *Ex Parte Fabiani*, 105 F. Supp. 139.

The Court below, citing the Witmer and Watkins v. Rupert cases for its authority has assumed the first position with respect to the Petitioner's case. Both the cited cases concern an attack by complaining registrants on their draft classification — they sought to enjoin orders to report for induction. Nowhere in the two cases cited was there any allegation made to the effect that they had been denied procedural due process of law. But the essence of the Petitioner's amended complaint filed in District Court, and upon which his motion for preliminary injunction was based; was the allegation of a denial to him of procedural due process of law. (R. 2-3) The Petitioner made no complaint respecting his classification. It is clear then that the ruling of the Court below based on the authority cited bears no relation or connection to the issue raised by the Petitioner and failed to resolve it or even come to grips with it.

The opinion of the Court below is in direct conflict with the opinion rendered in *Townsend v. Zimmerman*,

6th Cir. 237 F. 2d 376 (October, 1956). In that case the 6th Circuit Court set aside an order denying a motion for an injunction made in the District Court. The basis of the 6th Circuit opinion is founded on the principle that when a local draft board interfers with a registrant's administrative remedies and procedures it is a denial of procedural due process so that injunctive relief is available as a remedy. Expanding the decision somewhat, it must follow that if an injunction is a permissable remedy to a denial of procedural due process, then a denial of procedural due process causes irreparable harm.

The ruling made by the Court below is also in conflict with what the Court said in *Estep v. United States*, 327 U. S. 114 (1946). To say that "there is no direct judicial review of orders of the draft boards" fails to take into account errors which are obviously a denial of procedural due process of law. The arbitrary holding of the Court below seems to be the very "waste motion" and "judicial circuity" that this Court was talking about.

The Government may argue, in accordance with the ruling of the Court below, that the instant case is not the sort of case that can impede the operation of Selective Service procedures by injunction.

Just what sort of case is this? As was previously said, this case involves the interpretation of Selective Service regulations. Local Draft Board #47 ordered the Petitioner to report for induction on July 23, 1956 while in his new classification, without first giving the Petitioner an armed services physical examination and allowing him the usual 21 day waiting period therafter before ordering him to report for induction. The act of the Local Draft

Board posed the question of whether a registrant whose classification was reopened and considered anew can require that he be afforded all of his administrative remedies and procedures while in this new classification. In short, must a registrant previously classified, and who now gets a new classification, be given an armed services physical examination and the 21 day waiting period thereafter before he can be ordered to report for induction?

Section 1625.11, *Selective Service Regulations*, Title 32, Code of Federal Regulations, page 331, says as follows:

> "Classification considered anew when reopened:—When a local board reopens the registrants classification it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall have the effect of a new and original classification even though the registrant is again placed in the classification that he was in before his classification was reopened." . . .

The Local Draft Board and the Selective Service System for the State of Florida quite obviously acted in accordance with this section and the requirements of Sections 1625.12 and 1625.13 when they permitted the Petitioner to file his claim again as a conscientious objector (this claim had been made in previous classifications), to file once again all of his appeals provided him by the regulations, and to entertain them, and make rulings on them in accordance with the requirements of the regulations, even though these very same appeals had been submitted and ruled upon before in the Petitioner's previous classification.

After permitting the Petitioner to exercise all of his appellate and procedural rights the Local Draft Board then undertook the unlawful, arbitrary, and oppressive procedure of ordering the Petitioner to report for induction without first giving him an armed services physical examination and then giving him the customary 21 day minimum waiting period thereafter before ordering him to report for induction. This is clearly contrary to and in violation of Section 1628.10, *Selective Service Regulations*, Title 32, Code of Federal Regulations, page 341, which provides, in part, as follows:

> "Who will be examined:—Every registrant before he is ordered to report for induction . . . shall be given an armed forces physical examination . . . except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

Note that this section requires the physical examination to be given before the order to report for induction is sent to the registrant who is not delinquent or a volunteer. It does not permit a situation wherein the registrant is physically examined at the induction station immediately before his induction after he has been ordered to report there for induction, unless the registrant is delinquent or has voluntered. It is admitted by all parties concerned that the Petitioner is not delinquent nor is he a volunteer.

The order to report for induction was invalid because it also violated, in two ways, the requirements of Section 1631.7 32 C.R.F. First, the Petitioner was never mailed a

Certificate of Acceptability (DD Form #62) during his current classification since he wasn't given a physical examination before he was ordered to report for induction; the local board therefore, could not legally fix a date for induction. Secondly, the date he was ordered to report for induction (July 6, 1956) was not at least 21 days before the date fixed for induction (July 23, 1956). Finally, the entire procedure was also a violation of Section 1625.14 since the Petitioner was not ordered to report for induction in the "usual manner". Instead the very unusual procedure outlined below was used by the Petitioner's local board in their effort to induct the Petitioner.

The Government's position relies for authority on paragraph 2(a), Local Board Memorandum #28, issued by National Headquarters, Selective Service System. But paragraph 2(a) of Memorandum #28 could only have valid effect when it is applied to a situation wherein the registrant has already been given a physical examination during his current classification. This conclusion is elementary; if a registrant who is not delinquent or a volunteer has never had a physical examination and was ordered to report for induction this would be in clear violation of the requirements of Section 1628.10, Title 32, CFR, since the order to report came before his physical examination. But what of an instance where the physical examination was given during a previous classification as in the Petitioner's case? Section 1625.11, Title 32, CFR requires that his latest classification be treated as an entirely new one. Paragraph 2(a), Memorandum #28 permits a physical examination after the registrant has been ordered to report for induction. Is a physical examination really an important and necessary step in the chain of administrative events leading to induction? Certainly so, since accord-

ing to Section 1628.10, a registrant who is not delinquent or a volunteer cannot be ordered to report for induction without first being given his physical examination. The registrant has a right to demand one. Will the physical examination of the Petitioner, taken during a previous classification and more than 2½ years old, fulfill this requirement? Certainly not, for to permit this would instantly create a violation of Section 1625.11, which requires that a registrant whose classification was reopened and considered anew "shall be classified by the Local Draft Board as if he had never before been classified. Such classification shall have the effect of a new and original classification even though the registrant is again placed in the classification that he was in before his classification was reopened." The requirements of this section are precise. Note the words: "new", "original", "never before been classified". They do not permit a carry-over of any procedures or administrative actions from other and previous classification. The Local Draft Board must proceed as if they had never seen or heard of the registrant before. There is no lee-way, no equivocation, no provisions for circumvention by permitting opinion of the Local Draft Board to intervene. Its language is that of mandate and finality. There can be no carry-over into the new classification of any previous act or procedure, no matter how small or of apparent unimportance.

Recognizing this then, is there a conflict between the provisions of Section 1625.11 and paragraph 2(a) of Memorandum #28? There is if the Local Draft Board insists on using the result of a physical examination (or of any other procedure or act) taken of the registrant in another and previous classification. There is none if the Local Draft Board will order a physical examination

in proper time during new classification. It must be presumed that when paragraph 2(a) of Local Board Memorandum #28 was written and disseminated to Local Boards for action that there was no intent to create a conflict with existing regulations, or conversely, that regulations promulgated after Memorandum #28 should conflict with it.

The minimum 21 day waiting period after the physical examination and before induction is as eminent a procedure and as important a right as any other granted registrants by Selective Service regulations. The local board denied the Petitioner this right also and in so doing violated the requirements of Section 1631.7, 32 CFR as previously explained.

The conflict of circuits, the Fifth and the Sixth, on the question of injunctive relief by direct judicial review of procedural errors made by local boards that deny procedural due process of law, and the specific issue raised in the Petitioner's case respecting the conflict in interpretation of the procedural regulations require that the Court grant the writ and determine the questions and resolve them in the interests of the orderly administration of justice and the Selective Service regulations.

CONCLUSION

The petition for writ of certiorari should be granted for the reasons above stated.

Respectfully submitted,

LEONARD EDWARD ABEL
Counsel for Petitioner

June, 1957

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16312

MARVIN IRVING TAMARKIN,

Appellant,

-vs-,

SELECTIVE SERVICE SYSTEM LOCAL DRAFT BOARD #47, Miami, Florida, et al,

Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(March 29, 1957.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

PER CURIAM: The appellant registered under the Universal Military Training and Service Act. 62 Stat. 604, 50 U.S.C.A. Appendix Sec. 451 et seq., with Local Draft Board No. 47 in Miami, Florida. He was classified 1-A. He was given a physical and mental examination, found

acceptable and was so notified. Appellant claimed exemption as a conscientious objector, the claim was denied, he sought a review by the Appeal Board and by it he was again given a 1-A classification. Citing Selective Service Regulations, Sec. 1625.11 and Sec. 1628.10, 32 C.F.R. 331, 341, appellant claims he should have been given another physical examination before being ordered to report. He also asserts that Par. 18a, Army Reg. 601-270 and Par. 16, Local Board Memorandum of the Selective Service System, required that there be a waiting period of at least 21 days between a redetermination of his physical fitness and the date of his induction. The appellant brought suit against his Local Draft Board and its members, two of whom are sued by fictitious names, seeking preliminary and permanent injunctions against further procedures until he is given a physical examination and, if found physically qualified, a twenty-one day interval has elapsed. The district court entered an order denying a motion for a preliminary injunction and this appeal is from that order.

The operation of the Selective Service procedures cannot be impeded by injunctions in cases such as this. There is no right to a direct judicial review of orders of the draft boards. Witmer v. United States, 348 U. S. 375, 99 L. Ed. 428, 75 S. Ct. 392; Watkins v. Rupert, 2d Cir. 1955, 224 F. 2d 47. The order is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Fifth Circuit, held at the United States Courthouse in the City of Jacksonville, Florida, on the eleventh day of March, 1957.

Present: Hon. Elbert Parr Tuttle
Hon. Warren L. Jones
Hon. John R. Brown

MARVIN IRVING TAMARKIN,

Plaintiff-Appellant,

-vs-

SELECTIVE SERVICE SYSTEM LOCAL DRAFT BOARD, #47, MIAMI, FLORIDA, et al.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

And whereas, in the present term of October in the year of our Lord one thousand nine hundred and fifty-six, said Cause came on to be heard before the said United States Court of Appeals in the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this Cause be, and the same is hereby affirmed.

March 29, 1957
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals
for the Fifth Circuit

I HEREBY CERTIFY that a true copy of the foregoing petition was air-mailed to the Solicitor General, Department of Justice, Washington 25, D. C., on the _____day of_____, 1957.

_____

LEONARD EDWARD ABEL

I HEREBY CERTIFY that a true copy of the foregoing petition was delivered by hand to the office of the United States District Attorney, Federal Building, Miami, Florida, on the_____day of_____, 1957.

_____

LEONARD EDWARD ABEL